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April 6, 2009

Ms. Mary Schapiro
Chairman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Ms. Schapiro:

Several weeks ago, the Attorney General of New York State made a number of troubling assertions about Bank of America ("BOA") in a brief he filed on March 11, 2009. Namely, that BOA omitted from disclosures to its shareholders certain materials in its possession detailing very large discretionary bonuses that would be offered by Merrill Lynch prior to closing of the merger deal between Merrill and Bank of America.[1] As a result, BOA shareholders did not know, when they voted on the merger agreement, that BOA had agreed to allow Merrill to award up to $5.8 billion in performance bonuses under its "Variable Incentive Compensation Program," because BOA did not disclose to its shareholders an attachment to the merger agreement containing those details[2] (referred to herein as the "Bonus Attachment").

When my staff asked BOA about those assertions and its decision not to disclose the Bonus Attachment to BOA shareholders prior to their vote on the merger, BOA replied, in part, "Bank of America disclosed everything it was required to disclose prior to the December 5, 2008 shareholder vote on the merger. Bank of America did not disclose and was not required to

[1] Attorney General's Memorandum in Opposition to Motion to Intervene and Petition to Quash or Modify Subpoena ("AG Opp. Mem.") at 6, *Cuomo v. Thain*, No. 400381/09, (N.Y. Sup. Ct. Mar. 11, 2009).

[2] Disclosure Schedules to Agreement and Plan of Merger by and between Merrill Lynch & Co., Inc. and Bank of America Corporations (Sep. 14, 2008) at 14.

disclose to its shareholders prior to December 5, the details it then possessed about the potential size of the Merrill bonuses or the expected timing of their payment to Merrill's employees."[3]

BOA's response raises significant questions about the SEC's interpretation of the fiduciary duty to disclose all "material" information to shareholders when requesting shareholder action, and what constitutes "material" information for proxy rules designed to protect investors under the Securities Exchange Act of 1934.

Background

As you may know, the Merrill bonuses were substantial, and the condition of Merrill at the time it offered the bonuses was close to terminal. Merrill bonuses were 22 times larger than those paid by AIG.[4] The bonuses Merrill was allowed to award represented more than 10% of the merger deal at signing; its proportion increased relative to the value of the deal at closing. They were also very large relative to the monies allocated to Merrill through the Troubled Assets Relief Program (TARP). The Merrill bonuses were the equivalent of 36.2% of TARP monies Treasury allocated to Merrill and awarded to BOA after their merger.

The Merrill bonuses were awarded in a manner that departed significantly from Merrill company policy. The Merrill bonuses were determined by Merrill's Compensation Committee at its meeting of December 8, 2008, shortly after BOA shareholders approved the merger but before financial results for the Fourth Quarter had been determined.[5] According to company policy, Variable Incentive Compensation Program bonuses were supposed to reflect all four quarters of performance and were to be paid in January or later.[6] In this case, however, the bonuses were awarded in December before Fourth Quarter performance had been determined.

BOA had knowledge of and influence over Merrill's intent to pay out bonuses even before BOA took control of Merrill. According to the merger agreement of September 15, 2008, Merrill's bonus awards were to be made "in consultation with [Bank of America]."[7] BOA also decided not to disclose details of the Merrill bonus intention, including its size and its unusual

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[3] Email correspondence from John Collingwood, Bank of America, to Majority Staff (Mar. 29, 2009).

[4] Merrill awarded $3.62 billion in bonuses. The Merrill bonuses were many times the size of the AIG bonuses that caused so much public furor ($3,620 million versus $165 million).

[5] AG Opp. Mem. at 6.

[6] *See* Merrill Lynch & Co., Inc. 2007 Deferred Compensation Plan For A Select Group of Eligible Employees, Form 10-K (2006) at 4. The Merrill bonuses were awarded pursuant to its Variable Incentive Compensation Program. Merrill defined the program thus: ""Variable Incentive Compensation" means the variable incentive compensation or office manager incentive compensation that is paid in cash to certain employees of the Company generally in January or February of the Plan Year with respect to the prior Fiscal Year."

[7] AG Opp. Mem. at 6: "When it learned that Merrill's CEO John Thain was persistently seeking an eight-figure bonus, Bank of America informed Thain that its Board of Directors would strongly disapprove of that bonus. Following that threat, Thain withdrew his request for a

sequencing (to precede 4Q results). As BOA has informed this committee, they were not required to do so.

However, BOA was sufficiently concerned after the fact about the size of the Fourth Quarter losses at Merrill (of which the bonuses represented the equivalent of over 20%) that BOA CEO Ken Lewis met on two occasions with then-Secretary Henry M. Paulson and Chairman Ben Bernanke to explore withdrawing from the deal to acquire Merrill.[8]

Issue before the SEC

Before the fiscal year was closed, and before the disastrous earnings results of the Fourth Quarter had been tallied, Merrill awarded $3.62 billion in bonuses, mostly as cash, to top management at Merrill. To be eligible for the bonuses, Merrill employees had to have a salary of at least $300,000 and attained the title of Vice President or higher.[9] In the context of a company that was simultaneously recording losses large enough to threaten the existence of the business itself, it is difficult to see what consideration Merrill received in exchange for the bonuses. The bonuses do not correlate with performance, nor were they retention bonuses. Clearly, those bonuses were little more than a farewell gift from senior management to themselves.

The SEC is tasked with enforcing the federal securities laws, which generally prohibit fraudulent statements and omissions in communications to shareholders. The BOA proxy was subject to the general antifraud and proxy rules under the '34 Act. Those rules prohibit, respectively, the omission of "a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading," [10] and the making of "any solicitation… by means of a proxy statement…which at the time and in the light of the circumstances under which it is made…omits to state any material fact."[11] The Supreme Court has held in the context of a proxy solicitation that: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[12]

There is no question that any reasonable BOA shareholder would have considered the Merrill bonuses to be material to their decision on whether to approve the merger. The federal securities laws were designed to protect shareholders against precisely such omissions of material information. It is the SEC's responsibility to investigate and prosecute such abuses. Therefore, I request that the SEC provide the Subcommittee with greater insight into its enforcement of the

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bonus. In contrast, no similar threats were made when Bank of America learned about Merrill's intention to accelerate its bonus payments for other top executives."

[8] Dan Fitzpatrick, Susanne Craig and Deborah Solomon, *In Merrill Deal, U.S. Played Hardball*, WALL STREET JOURNAL, (Feb. 5, 2009).

[9] *See* Merrill Lynch *supra* note 7 at 5.

[10] *See* 17 CFR Sec. 240.10b-5(b).

[11] *See* 17 CFR Sec. 240.14a-9.

[12] *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

materiality standard as it applies to company disclosures to shareholders. Please provide answers to the following questions:

1) Does the SEC believe that Bank of America's omission of the Bonus Attachment constitutes a material omission? If not, please explain why not.

2) If so, what steps will the SEC consider to redress the material omission? For instance, BOA is holding a shareholder meeting later in April at which directors will be elected. Under what circumstances would the SEC order BOA to provide the Bonus Attachment to all shareholders in advance of that meeting?

I request that you provide your reply as soon as possible, but in no case later than **5:00 p.m. on Friday, April 10, 2009**.

The Oversight and Government Reform Committee is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X.

If you have any questions regarding this request, please contact Jaron Bourke, Staff Director, at (202) 225-6427.

Sincerely,

Dennis J. Kucinich

Dennis J. Kucinich
Chairman
Domestic Policy Subcommittee

Enclosure

cc: Jim Jordan
Ranking Minority Member

EXECUTION VERSION

DISCLOSURE SCHEDULES[1]

to

AGREEMENT AND PLAN OF MERGER

by and between

MERRILL LYNCH & CO., INC.

and

BANK OF AMERICA CORPORATION

Dated September 15, 2008

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[1] This Company Disclosure Schedule has been prepared and delivered pursuant to the Agreement and Plan of Merger, dated as of September 15, 2008 (the "Agreement"), by and between Merrill Lynch & Co., Inc., a Delaware corporation (the "Company"), and Bank of America Corporation, a Delaware corporation ("Parent").

This Company Disclosure Schedule and the information and disclosures contained herein are intended to qualify and limit the representations and warranties of the Company contained in the Agreement. Inclusion of any item in this Company Disclosure Schedule (i) shall not be deemed an admission that such item represents a material exception or material fact, event or circumstance or that such item has had or would have a Material Adverse Effect and (ii) shall not constitute, nor be deemed to be, an admission of liability concerning such item by the Company. Nor in such cases where a representation or warranty is qualified by a reference to materiality or Material Adverse Effect shall the disclosure of any matter in this Company Disclosure Schedule imply that any other undisclosed matter that has a greater value or could otherwise be deemed more significant (i) is or is reasonably likely to be material or (ii) has had or is reasonably likely to result in a Material Adverse Effect. Matters reflected in this Company Disclosure Schedule are not necessarily limited to matters required by the Agreement to be reflected in this Company Disclosure Schedule. Such additional matters are set forth for information purposes and do not necessarily include other matters of a similar nature. The headings contained in this Company Disclosure Schedule are for convenience of reference only and shall not be deemed to modify or influence the interpretation of the information contained in this Company Disclosure Schedule or the Agreement.

Terms defined in the Agreement and not otherwise defined in this Company Disclosure Schedule are used herein as defined in the Agreement. This information is disclosed in confidence for the purposes contemplated in the Agreement and is subject to the confidentiality provisions of the Agreement and any confidentiality agreement or non-disclosure agreement executed by the parties hereto relating to the transactions contemplated by the Agreement.

Subsidiaries previously identified by the Company to Parent in writing, in accordance with the transition election program previously described to Parent in writing and otherwise in accordance with Section 409A of the Code provided that such transition election program (i) does not increase the Company's costs, in other than an immaterial respect and (ii) is not applicable to any director or executive officer of the Company or any other member of the Company's Executive Management Team.

- 5.2(b)(iii), 5.2(c)(i) and 5.2 (c)(ii) - Variable Incentive Compensation Program ("VICP") in respect of 2008 (including without limitation any guaranteed VICP awards for 2008 or any other pro rata or other 2008 VICP awards payable, paid or provided to terminating or former employees) may be awarded at levels that (i) do not exceed $5.8 billion in aggregate value (inclusive of cash bonuses and the grant date value of long-term incentive awards) less any 2008 incentive compensation value (other than any value in respect of any replacement cash or long-term incentive awards) in respect of the New Hire Cash Compensation Pool, and (ii) do not result in 2008 VICP-related expense exceeding $4.5 billion, less any 2008 incentive compensation expense (other than any expense in respect of any replacement cash or long-term incentive awards) in respect of the New Hire Cash Compensation Pool. Sixty percent of the overall 2008 VICP shall be awarded as a current cash bonus and forty percent of the overall 2008 VICP shall be awarded as a long-term incentive award either in the form of equity or long-term cash awards. The form (i.e., equity v. long-term cash) and terms and conditions of the long-term incentive awards shall be determined by the Company in consultation with Parent, *provided* that in no event shall such long-term incentive awards contain acceleration or vesting rights (whether single or double trigger and including the rights provided in the applicable Company equity incentive plan) in connection with the Merger (except for any such rights applicable to equity awards granted in satisfaction of a 2008 VICP guarantee to the extent specifically required by the terms of an offer letter entered into prior to September 14, 2008) or any "good reason" termination feature (including vesting in connection with a "good reason" termination, except any good reason termination feature applicable to equity awards granted in satisfaction of a 2008 VICP guarantee to the extent specifically required by the terms of an offer letter entered into prior to September 14, 2008). The allocation of the 2008 VICP among eligible employees shall be determined by the Company in consultation with Parent.

- 5.2(c)(ii), 5.2(c)(iii) and 5.2 (c)(v) - The Company has extended offer letters which have not yet been accepted to the following individuals: **REDACTED**

- 5.2 (c)(ii), 5.2(c)(iii) and 5.2(c)(v) - The Company and its Subsidiaries may: (i) hire employees whose individual annual cash compensation does not exceed $3 million, subject to an annualized cash compensation limit for all such hired employees of up to $100 million in the aggregate (the "New Hire Cash Compensation Pool"); and (ii) hire an unrestricted number of financial advisors in the ordinary course of business consistent with past practice and on terms that are consistent with past practice.

- **REDACTED**